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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL THARP,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 08A02-0703-CV-268
	)	
SOON NEFF,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE CARROLL CIRCUIT COURT
The Honorable Donald E. Currie, Judge
Cause No. 08C01-0608-CT-0008

July 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-plaintiff Michael Tharp appeals the trial court's dismissal of his complaint for damages against appellee-defendant Soon Neff that stemmed from an automobile accident. Specifically, Tharp argues that even though the complaint and accompanying documents had been incorrectly addressed when they were purportedly mailed to the county clerk's office, the trial court erred in dismissing the action because the complaint had been properly filed when it was placed in the mail. Concluding that the action was properly dismissed, we affirm the judgment of the trial court.

FACTS

On May 18, 2004, Tharp was injured in an automobile collision in Tippecanoe County involving James Shook, the driver of the other vehicle. Ten days later, Tharp was involved in another motor vehicle accident with Neff that occurred in Carroll County.

As a result of these incidents, Tharp retained the law firm of Keller & Keller to represent him in both cases. On August 18, 2006, Tharp filed a complaint for damages and demand for jury trial in the Carroll Circuit Court against Neff. Neff answered the complaint denying any negligence, and included as an affirmative defense, that Tharp had failed to assert his claim within the applicable statute of limitations. Thereafter, Neff filed a motion for judgment on the pleadings pursuant to Indiana Trial Rule 12(C), claiming that Tharp's action was not timely filed because the statute of limitations had run.

In response to that motion, Tharp produced a letter dated October 17, 2005, indicating that he had purportedly mailed to the "Carroll Circuit Clerk, P.O. Box 1665, Lafayette

Indiana, 47902,"[1] via certified mail, the complaint, appearances, summonses, and the required filing fee. Appellant's App. p. 39 (emphasis added). That correspondence requested the Carroll Circuit Court Clerk to return a file-marked copy of each document to Tharp. Additionally, Tharp submitted an affidavit from a paralegal at Keller & Keller, stating that "on October 17, 2005, [she] mailed the summons, complaint and filing fee check in the amount of $130.00 to Carroll Circuit Court." Id. at 38. However, the affidavit neither referenced the specific matter nor stated whether the documents had been sent by certified mail.

Because the correspondence contained the incorrect address, the Carroll County Clerk never received Tharp's letter and enclosures. Following a hearing on December 21, 2006, the trial court granted Neff's motion for judgment on the pleadings. Specifically, the trial court entered the following findings of fact and conclusions of law:

> 1. Plaintiff claims that two lawsuits were filed on Plaintiff's behalf on October 17, 2005. One lawsuit in Tippecanoe County against Defendant James Shook and another lawsuit in Carroll County against Defendant, Soon Neff.
>
>   a. There is no record that any lawsuit was ever received by the Carroll County Clerk's office until this action was filed August 18, 2006, nearly six months after the Statute of Limitations had expired.
>   b. The Memorandum filed by Plaintiff evidences that the lawsuit in Tippecanoe County was not filed October 17, 2005, but October 24, 2005. (See Plaintiff's Exhibit L).
>   c. Despite the Letter from Plaintiff's attorneys' offices, addressed to the Carroll Circuit Court and dated October 17, 2005, there exists no independent evidence that the lawsuit was ever mailed or deposited with the U.S. postal service. Additionally, the U.S. Postal

[1] According to the Indiana Legal Directory, the address for the Carroll Circuit Court is P.O. Box 28, Delphi, Indiana, 46923.

Certified Mail Receipt attached to Plaintiff's Exhibit "J" fails to support a finding that the Complaint and necessary filing fee were ever properly deposited with the U.S. postal service.

2. Plaintiff's letter to the Carroll County Clerk, dated October 17, 2005 (Plaintiff's Exhibit J), requested that a file-marked copy of each document be returned in an enclosed self-addressed, stamped envelope enclosed with the other documents.

3. Despite the fact that the Statute of Limitations for the instant case did not expire for nearly seven (7) months after Plaintiff allegedly filed its Complaint against Defendant in Carroll County, Plaintiff failed to follow up and/or ascertain the status of said Complaint.

CONCLUSIONS OF LAW

1. Plaintiff's action is barred by the Statute of Limitations.

2. Defendant's Motion for Judgment on the Pleadings is granted. This cause is hereby dismissed.

Id. at 3-4. Tharp now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that Indiana Trial Rule 12(C) controls motions for judgment on the pleadings. The rule states in relevant part,

> if, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Here, because the trial court did not exclude any evidence in this matter, it should be treated like a motion for summary judgment.

That said, we note that summary judgment is appropriate only when there are no

genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). In reviewing a summary judgment ruling, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. AutoXchange.com, Inc. v. Dreyer and Reinbold, Inc., 816 N.E.2d 40, 47 (Ind. Ct. App. 2004). Thus, on appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. Id. In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party. Id. The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's ruling was improper. Id. Accordingly, the grant of summary judgment must be reversed if the record discloses an incorrect application of the law to the facts. Ayres v. Indian Heights Volunteer Fire Dep't, Inc., 493 N.E.2d 1229, 1234 (Ind. 1986). We may affirm the grant of summary judgment upon any basis argued by the parties and supported by the record. Shepard v. Schurz Commc'ns, Inc., 847 N.E.2d 219, 224 (Ind. Ct. App. 2006).

Finally, we observe that the trial court entered findings of fact and conclusions of law in support of its judgment. Special findings are not required in summary judgment proceedings and are not binding on appeal. AutoXchange.com, 816 N.E.2d at 48. However, such findings offer this court valuable insight into the trial court's rationale for its judgment and facilitate appellate review. Id.

II. Tharp's Claim

In addressing Tharp's contention that the trial court erred in dismissing his complaint

against Neff, we initially observe that pursuant to Indiana Code section 34-11-2-4, "[a]n action for: (1) injury to [a] person . . . must be commenced within two (2) years after the cause of action accrues." A cause of action for a personal injury claim accrues and the statute of limitations begins to run when the plaintiff knew, or in the exercise of ordinary diligence could have discovered, that an injury had been sustained as a result of the tortious act of another. Malachowski v. Bank One, Indianapolis, 590 N.E.2d 559, 564 (Ind. 1992).

According to the complaint, Tharp's claim for injuries against Neff arose out of the motor vehicle accident that occurred on May 28, 2004. Thus, Tharp's cause of action accrued, and the statute of limitations began to run, on that day. Hence, Tharp had until May 28, 2006, to file his complaint, yet he did not file it until August 18, 2006—nearly two and one-half months after the statute of limitations had expired.

Notwithstanding these circumstances, Tharp directs us to Indiana Trial Rule 5(F) for the proposition that his complaint against Neff was filed in a timely manner Specifically, this rule provides in relevant part that

> The filing of pleadings, motions, and other papers with the court as required by these rules shall be made by one of the following methods:
>
> . . .
>
> (3) Mailing to the clerk by registered, certified or express mail, return receipt requested. . .
>
> . . .
>
> Filing by registered or certified mail and by third-party commercial carrier shall be complete upon mailing or deposit.
>
> Any party filing any paper by any method other than personal delivery to the clerk shall retain proof of filing.

In accordance with this rule, Tharp claims that the action against Neff was filed on October 17, 2005, when the complaint was mailed. As noted above, Tharp designated a letter to the trial court, indicating that he purportedly mailed the complaint, copies of appearances, summonses, and the filing fee to the Carroll Circuit Clerk on October 17, 2005. Appellant's App. p. 39. However, the letter was addressed to the clerk in Lafayette, Indiana. Id. Moreover, the affidavit submitted by the paralegal failed to indicate: (1) the matter that was referenced, or (2) that Tharp's complaint was mailed via registered, certified, or express mail, return receipt requested, as required by Trial Rule 5(F)(3). Thus, contrary to Tharp's contention, the complaint was not mailed to the Carroll County Clerk, but instead to an unknown address in Lafayette. In our view, the letter is simply not evidence that Tharp "mailed or deposited" the actual complaint as contemplated by Trial Rule 5(F)(3). Instead, the letter is merely evidence that Tharp's counsel created an incorrectly addressed letter.

In light of these circumstances, we find our Supreme Court's decision in Boostrom v. Bach, 622 N.E.2d 175 (Ind. 1994), instructive. In Boostrom, a former client attempted to bring a small claim against her former attorney for alleged malpractice. On the same day that the statute of limitations was to expire, Boostrom mailed her complaint to the clerk of the court by certified mail. However, she failed to include the filing fee. When the court clerk received the complaint, the clerk did not file it, but instead sent a letter to Boostrom informing her of the required filing fee. Boostrom later supplied the filing fee to the clerk and her complaint was then filed after the statute of limitations had run.

The defendant moved for summary judgment, arguing that Boostrom's complaint was barred by the statute of limitations. The trial court agreed and determined that Boostrom's action was barred and entered judgment in the defendant's favor. Id. at 175. On appeal, this court reversed, holding that "a complaint is 'filed' for [statute of] limitations purposes when it is properly mailed in accordance with T.R. 5(E)(2)."[2] Boostrom v. Bach, 589 N.E.2d 275, 277 (Ind. Ct. App. 1992).

However, our Supreme Court granted transfer and rejected Boostrom's argument that the complaint was timely filed when she mailed her complaint to the clerk in accordance with Trial Rule 5(E). The Supreme Court observed that "[t]his view misapprehended the significance of T.R. 5(E), which only defines how a required filing may be made." Boostrom, 622 N.E.2d at 176 (emphasis in original). The Boostrom court also determined that "while the Court of Appeals was correct in saying that the filing of a notice of claim may occur by certified mail return receipt requested and that the filing is complete upon mailing, it does not necessarily follow that an action is commenced by mailing only the notice." Id. (emphasis added).

In essence, Tharp's argument parallels the argument by Boostrom. In particular, even though Tharp may have deposited his complaint in the mail pursuant to Trial Rule 5(F)(3), it does not necessarily follow that his action was commenced when he mailed the complaint to an incorrect address, inasmuch as there was an absence of evidence indicating that the complaint was actually mailed or deposited via certified mail to the Carroll County Clerk.

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[2] Trial Rule 5(E)(2) is the former version of Trial Rule 5(F)(3).

Although Indiana Trial Rule 5(F)(3) does not state that the filing fee is required—yet Boostrom determined that it was—Trial Rule 5(F)(3) specifically states that the complaint must be "mailed to the clerk," which Tharp failed to accomplish. Thus, we conclude that Tharp's mailing on October 17, 2005, did not achieve "filing" as contemplated by Indiana Trial Rule 5(F)(3), and the trial court correctly determined that Tharp's action was barred by the statute of limitations as a matter of law.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.